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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. NATHANIEL KEON CURTIS, Appellant.	2 CA-CR 2007-0408 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20064588

Honorable Howard Hantman, Judge

AFFIRMED

John William Lovell — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Nathaniel Keon Curtis was convicted of selling 750 milligrams or more of cocaine base, a narcotic drug. The trial court found Curtis had two historical prior felony convictions and sentenced him to a presumptive term of 15.75 years' imprisonment.

¶2 Counsel has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Clark*, 196 Ariz. 530, 2 P.3d 89 (App. 1999), avowing he has reviewed the entire record and found no arguable issue to raise on appeal. In compliance with *Clark*, counsel has provided "a detailed factual and procedural history of the case with citations to the record, [so] this court can satisfy itself that counsel has in fact thoroughly reviewed the record." 196 Ariz. 530, ¶ 32, 2 P.3d at 97.

¶3 Counsel suggests the trial court may have erred in admitting an audio recording Tucson police officer Christopher Widmer testified he had made while he was arranging for and purchasing cocaine base from Curtis and in permitting an out-of-state alibi witness to identify Curtis telephonically by way of an in-court photograph transmitted by cellular telephone. But counsel also acknowledges that Curtis is unable to establish any prejudice resulting from these alleged errors. In a supplemental brief filed pro se, Curtis raises these same issues and also challenges the court's admission of his driver's license, which was found in the house where Widmer had purchased the drugs.

¶4 Pursuant to our obligation under *Anders*, we have reviewed the record in its entirety and are satisfied it supports counsel's recitation of the facts. Viewed in the light most favorable to upholding the jury's verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999), the evidence established that Widmer purchased more than 750 milligrams of cocaine base from Curtis, who had two historical prior felony convictions. Thus, substantial evidence supported all the elements necessary for Curtis's conviction, *see*

A.R.S. §§ 13-3401(36)(c); 13-3408(A)(7), (D); 13-3420, and the sentence the trial court imposed was within the statutory range authorized by A.R.S. § 13-604(D).

¶5 The issues identified in counsel's brief and Curtis's supplemental pro se brief do not warrant reversal. Curtis did not object at trial to admission of a redacted version of the audio recording Widmer said he had made of his communications with Curtis. We therefore review the court's decision to admit that recording only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005). In light of Widmer's in-court identification of Curtis as the man from whom he purchased the cocaine base, we conclude the admission of the audio recording, if error at all, was not prejudicial. *See id.* ¶ 27 (fundamental error review requires determination of whether, in absence of error, reasonable jury could have reached different result).

¶6 Similarly, Curtis did not object to using a telephonically-transmitted photograph to enable his alibi witness, Robert D., to identify him while testifying telephonically. Indeed, Curtis suggested this method of identification as an alternative to requesting a mistrial and continuance in order to subpoena the witness. Because Robert was able to identify Curtis from the transmitted photograph, Curtis cannot establish prejudice from the court's permitting this novel alternative to in-court identification, and the admission of Robert's identification testimony did not result in fundamental error.[1] *See id.*

[1]For the same reasons, we reject counsel's suggestion that the trial court may have erred in not declaring a mistrial sua sponte upon learning the witness would not personally appear at trial.

¶7 Curtis's argument in his pro se brief that the trial court erred in admitting his driver's license, found at the house where Widmer had purchased the cocaine base, is also without merit. Curtis maintains the license was "merely circumstantial" evidence and asserts it had been stolen from him almost a year before Widmer purchased the drugs. He contends, therefore, that admitting the license into evidence caused the jury to wrongly assume his association with the crime scene. The circumstantial nature of evidence is not a basis for its exclusion, however, *see* Rule 402, Ariz. R. Evid., and we find no error, much less fundamental error, in the court's admission of the license.[2]

¶8 We find no error warranting reversal and therefore affirm Curtis's convictions and sentences.

JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

JOHN PELANDER, Chief Judge

J. WILLIAM BRAMMER, JR., Judge

[2]Curtis did not make this objection at trial.